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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

GRAND CANYON TRUST AND THE WILDERNESS SOCIETY,
Respondents-Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly deferred to the Environmental Protection Agency's scientific determination that visibility impairment at Grand Canyon National Park is "reasonably attributable" to Navajo Generating Station emissions?

PARTIES TO THE PROCEEDINGS

Petitioners Central Arizona Conservation District, *et al.*, were petitioners below. Respondent United States Environmental Protection Agency was respondent below. Respondents-Intervenors Grand Canyon Trust and The Wilderness Society were respondents-intervenors below. Pursuant to Rule 29.1, respondents-intervenors note that they have no parents, subsidiaries, or affiliates.

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BRIEF FOR RESPONDENTS-INTERVENORS IN OPPOSITION

Respondents-Intervenors Grand Canyon Trust and The Wilderness Society respectfully pray that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

This is a case in which the Environmental Protection Agency ("EPA" or "the Agency") undertook a comprehensive review of a complicated and voluminous scientific record, prior to issuing a technical regulation governing emissions of sulfur dioxide from a specific generating plant. The Court of Appeals unanimously upheld the

regulation as within the bounds of the Agency's authority and not arbitrary or capricious. Although there is no basis for this Court to exercise its certiorari jurisdiction to undertake yet another review of the scientific data in the record, that data is outlined below to confirm the ample grounds supporting the Agency's action and the Court of Appeals' decision.

On October 3, 1991, EPA promulgated regulations requiring a 90% reduction in sulfur dioxide ("SO_2") emissions at the Navajo Generating Station ("NGS")[1] to remedy wintertime visibility impairment at the Grand Canyon National Park ("the Grand Canyon") that is attributable to NGS. 56 Fed. Reg. 50,172 (Oct. 3, 1991). NGS is a coal-fired electric generating station located fifteen miles from the mouth of the Grand Canyon. NGS currently employs no SO_2 emission control technology and emits approximately 163 tons of SO_2 per day, making it the second largest uncontrolled source of SO_2 in the western United States.

Wintertime visibility impairment at the Grand Canyon is characterized by periodic haze "inversions." The haze is caused by a chemical reaction between SO_2 and water. When the prevailing winds mix NGS SO_2 emissions with high levels of relative humidity, a river of haze fills the canyon. The haze episodes are layered—thicker beneath the rim of the canyon than above—blocking the views of the Grand Canyon's majestic expanse that make it one of the seven natural wonders of the world.

EPA conducted the challenged rulemaking under the authority of Section 169A of the Clean Air Act, 42 U.S.C. § 7491. Section 169A specifically targets the elimination of visibility impairment in national parks and

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[1] The Salt River Project ("SRP") is the operating agent of NGS. The NGS participants are SRP, the United States Bureau of Reclamation, Los Angeles Department of Water and Power, Arizona Public Service Co., Nevada Power Co., and Tucson Gas and Electric Co. *See* Pet. App. 2716.

wilderness areas—designated "Class I" areas—to preserve our country's most cherished and pristine federal lands. Visibility at many national parks—the Grand Canyon in particular [2]—had already been impaired due to emissions from existing sources. Therefore, Congress enacted Section 169A to provide a specific mechanism for redressing pre-existing visibility impairment. Congress set the explicit goal of "prevent[ing] any future, and * * * remedying * * * any existing, impairment of visibility in mandatory class I Federal areas." 42 U.S.C. § 7491(a)(1).

Section 169A requires a source that "emits *any* air pollutant which may *reasonably be anticipated* to cause or contribute to *any* impairment of visibility" in a Class I area to install stringent emission controls. *Id.* § 7491(b)(2)(A) (emphases supplied). The statutory requirement clearly defines the point at which controls must be imposed on an offending source: controls are required at the point when emissions attributable to the source can reasonably be anticipated to cause any visibility impairment in a protected area. Congress mandated this extremely low triggering threshold to assure that controls are installed at the earliest sign of impairment in order to protect our most valued federal lands.

Section 169A directs EPA to promulgate regulations to assure "reasonable progress toward meeting the national goal" of preventing and remedying visibility impairment in Class I areas. *Id.* § 7491(a)(4). In the regulations, the Agency must require each state containing a Class I area to revise its State Implementation Plan ("SIP") to establish "such emission limits, schedules

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[2] In the legislative history of Section 169A, Congress specifically cited the Grand Canyon as one of two national parks that suffer visibility impairment due to emissions from power plants. H.R. Rep. No. 294, 95th Cong., 1st Sess. 137 (1977). The legislative history also indicates that Congress expected NGS to install pollution control equipment to meet the requirements of Section 169A. *See* 123 Cong. Rec. 27,076 (1977) (statement of Rep. Waxman).

of compliance and other measures as may be necessary to make reasonable progress * * *." *Id.* § 7491(b)(2).

EPA promulgated the visibility regulations required under Section 169A in 1980. *See* 40 C.F.R. §§ 51.300-51.307. Pursuant to these regulations, the federal land manager for each Class I area must certify to state officials that visibility impairment exists at a Class I area within the state's borders when evidence of visibility impairment is found. *Id.* § 51.302(c)(1). The regulations then require the state to identify each existing stationary facility that may "reasonably be anticipated to cause or contribute" to the visibility impairment. *Id.* § 51.302 (c)(4)(i). "Reasonably attributable" impairment is impairment "attributable by visual observation or any other technique the State deems appropriate." *Id.* § 51.301(s). Finally, the regulations require an affected state to include emission limitations, schedules of compliance, and other measures as may be necessary to make reasonable progress towards meeting the national visibility goal in their SIP submissions to EPA. *Id.* § 51.302(c)(2)(i).

Accordingly, EPA's visibility regulations focus on visibility impairment that is reasonably attributable to a specific source or small group of sources. In promulgating the visibility regulations, the Agency recognized that some visibility impairment is the result of "regional haze" and is not attributable to specific sources. The Agency distinguished the two types of visibility impairment in the preamble to the regulations. "Reasonably attributable" impairment is "[s]moke, dust, colored gas plumes or layered haze emitted from stacks which obscure the sky or horizon and are relatable to a single source or a small group of sources." 45 Fed. Reg. 80,084, 80,085 (Dec. 2, 1980). By contrast, "regional haze" is "widespread, regionally homogeneous haze from a multitude of sources which impairs visibility in every direction over a large area." *Ibid.* The 1980 rulemaking only purported to regulate reasonably attributable impairment. EPA viewed the regulation of reasonably attributable visibility impairment as

Phase I of its overall visibility program; regional haze was to be regulated in a future Phase II. *See id.* at 80,085-86. EPA has not promulgated Phase II of its visibility program.

In the event a state submits a SIP that does not meet the requirements of the Clean Air Act (or fails to submit a SIP at all), Section 110(c)(1) of the Clean Air Act requires EPA to promulgate a Federal Implementation Plan ("FIP") for the state. *See* 42 U.S.C. § 7410(c)(1). Thus, EPA must promulgate a visibility FIP for a state that defaults on its obligation to submit a visibility SIP. In such cases, EPA stands in the shoes of the affected state. The Agency is charged with all the rights and duties related to the implementation of the visibility regulations that would otherwise fall to the state. *See* 54 Fed. Reg. 36,948, 36,952 (Sept. 5, 1989).

On November 24, 1987, EPA disapproved Arizona's visibility SIP because the state failed to address certified visibility impairments in Class I areas within its borders. 52 Fed. Reg. 45,132, 45,133 (Nov. 24, 1987). EPA took this action—in which it also disapproved the visibility SIPs of 32 other states—pursuant to a settlement agreement reached with the Environmental Defense Fund (EDF). EDF had filed suit in the United States District Court for the Northern District of California alleging that EPA had failed to promulgate visibility FIPs for states—including Arizona—that had failed to submit SIPs to EPA as required by the 1980 visibility regulations. *Environmental Defense Fund v. Reilly,* No. C82-6850-RPA (N.D. Cal. Apr. 20, 1984). In the 1987 action, EPA promulgated general FIP requirements and long-term strategies for the affected states pursuant to the authority of Sections 110(c)(1) and 169A. 42 U.S.C. §§ 7410(c)(1), 7491. EPA deferred a decision on control requirements at facilities in the affected states pend-

ing completion of monitoring studies regarding potential sources of impairment.[3]

As part of the monitoring effort at the Grand Canyon, the National Park Service ("NPS") conducted the Winter Haze Intensive Tracer Experiment ("WHITEX") study to determine NGS's impact on visibility impairment at the Grand Canyon. Petitioners' Excerpts of Record ("ER") 14. One important feature of the WHITEX study was the injection of a unique tracer chemical into the NGS emissions stack to mark the presence of NGS emissions in the atmosphere. The WHITEX study group was then able to measure concentration levels of the tracer chemical at Hopi Point on the rim of the Grand Canyon and correlate the presence of the tracer to the presence of visibility-impairing sulfates. In all, the NPS used nine techniques to attribute observed visibility impairment at the Grand Canyon to specific sources. 54 Fed. Reg. at 36,951. The WHITEX study concluded that NGS was the largest single contributor to visibility impairment in the Grand Canyon. More specifically, the study found that NGS contributes approximately 40% of the wintertime visibility impairment at the Grand Canyon and up to 70% of the impairment during the most severe visibility impairment episodes. *Ibid.*; ER 14 at Ch. 9.

WHITEX marked the first of several studies examining the impact of NGS emissions on visibility impairment in the Grand Canyon. Several other analyses were con-

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[3] *See* 52 Fed. Reg. at 45,133. EPA subsequently found it unnecessary to devise control strategies in 30 of the 32 states because the Agency could not "reasonably attribute" visibility impairment in the Class I areas located within those states to specific sources. 54 Fed. Reg. 21,904, 21,905 (May 19, 1989); 54 Fed. Reg. at 39,950-51; 55 Fed. Reg. 24,060, 24,062 (June 13, 1990). In one of the two remaining states, EPA anticipated that requirements placed on a source under other provisions of the Clean Air Act would adequately remedy the visibility impairments reasonably attributable to that source. The Agency thus found further control strategies unnecessary. 55 Fed. Reg. at 24,062. This left only one state—Arizona—subject to further regulation.

ducted after the NPS released WHITEX. Some of the studies relied on the collection of new data; others re-examined the WHITEX data and methodology. The studies, all of which were placed in the rulemaking docket, included the National Academy of Sciences ("NAS") evaluation of WHITEX entitled *Haze in the Grand Canyon: An Evaluation of the Winter Haze Intensive Tracer Experiment*, ER 15; the Navajo Generating Station Visibility Study ("NGSVS"), ER 46, sponsored by the NGS owners; and reports by Air Resource Specialists, Inc., Respondent's Supplemental Excerpts of Record ("SER") 2, and Latimer & Associates, SER 32. Each report concluded that NGS contributed to visibility impairment in the Grand Canyon, although they differed as to the precise amount of the impairment attributable to NGS. EPA relied upon each report in promulgating its final rule.

In response to industry criticisms of WHITEX, EPA co-sponsored the NAS review of the report. NAS praised WHITEX for providing "a valuable data base that sheds light on the nature and magnitude of the haze problems at GCNP" and commended NPS for its innovative use of CD_4 as the tracer chemical. ER 15 at 37. NAS concluded that "NGS contributed significantly to haze at Hopi Point in GCNP." *Id.* at 3, 37. The report also noted that one of the "greatest weaknesses of the [WHITEX] study was that no measurements were made below the rim of the Grand Canyon, within the canyon itself." *Id.* at 25. Meteorological evidence, still photographs, and time-lapse video "suggest that sulfur concentrations in the canyon might have been considerably greater than was observed on the rim." *Ibid.* This critical flaw suggests that WHITEX actually underestimated the degree of visibility impairment at the Grand Canyon attributable to NGS.

SRP sponsored the NGSVS in the winter of 1990 to investigate the impact of NGS emissions on visibility im-

pairment in the canyon. The NGS owners discovered that "NGS emittants can affect visibility in [the Grand Canyon]." ER 46 at 2-12. In one impairment episode, the NGSVS found that NGS emissions were responsible for 55% of the visibility impairment. *Id.* at 2-2. While the NGSVS data indicated that controlling SO_2 emissions from NGS would result only in a 2% improvement in the winter seasonal average standard visual range, the report noted that "emissions from the NGS may have been in the vicinity of the Grand Canyon less often in 1990 than in 1987 [the year of the WHITEX study] as well as less often than longer-term averages would predict" due to abnormal weather patterns occurring in 1990.[4] Like the WHITEX report, NGSVS failed to study the impact of NGS beneath the rim of the canyon.[5]

The Air Resource Specialists, Inc. ("ARS") report confirmed that WHITEX and the NGSVS study substantially *underestimated* NGS's impact on visibility in the Grand Canyon and found significant evidence of visibility impairment at other Class I areas attributable to NGS. ARS cited four factors supporting these important conclusions. First, measurements taken at the Indian Gardens monitoring site 3,000 feet below the canyon's rim show that sulfate concentrations are significantly higher than sulfate concentrations for the same time period at the Hopi Point monitoring site on the canyon's rim. SER 2 at 12-1. Second, a combined modeling and photographic analysis of the NGS plume suggests that NGS emissions impair visibility at each of the eight national parks on the Colorado plateau (often referred to as "Golden Circle" national

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[4] ER 2-11. In comments submitted to the rulemaking docket, Dr. Thomas Cahill—a consultant for both the WHITEX and NGSVS studies—noted that if the NGSVS data had been adjusted to reflect typical meteorology, the NGSVS results would have been "much closer to the WHITEX estimates." SER 14 at 2-4.

[5] Although the NGSVS study collected data from below the rim, SRP chose not to analyze it.

parks) that loosely surround NGS, during each of the four seasons. Third, analysis of wind flows indicates that in 1990—the year of SRP's visibility study—winds blew NGS emissions into the Grand Canyon less frequently than in a typical year, allowing visitors to enjoy, and scientists to study, an unusually clean year. (Not surprisingly, however, the windflow analysis indicated that Class I areas in other directions suffered greater visibility impairment than usual in 1990.) *Id.* at 11-1. Finally, the ARS report provides powerful computer-generated pictorial evidence of the visibility improvements that will occur at the Grand Canyon if sulfur dioxide emissions at NGS are curtailed. *Id.* at 11-4.

The Latimer & Associates report was the final major study of NGS visibility impacts on Class I areas. This study modeled NGS emissions in one-hour increments between 1986 and 1990, calculating SO_2 and sulfate concentrations, incremental light extinction, and terrain contrast changes three times a day. SER 32 at 11. The primary objective of the study "was to determine the perceptibility of specific haze episodes and the controls needed [at NGS] to eliminate perceptible hazes throughout the Golden Circle." *Id.* at 1. Summarizing its contents, the Latimer & Associates report concluded that:

- Perceptible sulfate haze impacts due to NGS emissions are calculated to occur in every Golden Circle park and in each season during the 5-year period modeled.
- Haze impacts are generally highest in the Grand Canyon in winter, but impacts in other parks and in other seasons are significant.
- There is considerable year-to-year variation in transport conditions; therefore, one cannot rely on a single season's data to make general conclusions regarding frequency and magnitude of impact.
- The winter of 1990 when the SRP study was carried out had a much lower calculated impact due

to NGS than the winter of 1987 when WHITEX was carried out. In 1990 Canyonlands was much more frequently impacted.

- To totally eliminate perceptible NGS haze impacts in all parks and in all seasons, SO_2 emissions must be reduced by 89-95 percent * * *.

Id. at 17.

Latimer & Associates' findings dovetail those of the ARS study. Using different methodologies, both concluded that NGS emissions traveled to all of the Golden Circle national parks on the Colorado plateau throughout the year. Both independently concluded that NGS must reduce its SO_2 emissions approximately 90% to eliminate perceptible visibility impairment attributable to NGS. *Ibid.*; SER 2 at 11-1. Thus, both reports fully support the 0.10 lb./MMBtu emission limitation—a 90% reduction in NGS emissions—that EPA promulgated in its final rule.

The coalescence of scientific data on the presence of NGS emission at the Grand Canyon led several of the participants in the rulemaking to inquire as to the feasibility of opening multiparty discussions regarding the most cost effective control option. This led EPA, in early 1991, to facilitate discussions between representatives of SRP, the Grand Canyon Trust, and EDF in an effort to find a mutually acceptable control option. A representative of the Central Arizona Water Conservation District ("CAWCD"), one of the petitioners in this action, participated in the first negotiating session, but did not return. The parties met repeatedly during a three-month period in mid-1991 to discuss various control options and their related costs in an attempt to clarify all options and their costs. As a result of these discussions, SRP, on behalf of itself and the other NGS owners, and the two environmental groups submitted a Memorandum of Understanding to EPA proposing an alternative control option that was $16.4 million per year

less expensive than the primary option presented in EPA's proposed rule, yet provided a substantially greater environmental benefit to the Grand Canyon. *See* 56 Fed. Reg. 38,399, 38,401 (Aug. 13, 1991). After reopening the comment period to permit public input on this joint proposal, EPA promulgated a final rule substantially adopting the terms of the Memorandum of Understanding. 56 Fed. Reg. at 50,177.

Despite the historic agreement between the owners of NGS and the environmental groups on the alternative control option, CAWCD—after minimal participation during the EPA rulemaking and subsequent settlement discussions—filed a petition for review of EPA's action in the United States Court of Appeals for the Ninth Circuit pursuant to 42 U.S.C. § 7607(b)(1). The Court of Appeals denied the petition. In his opinion for the unanimous court, Judge Goodwin found that EPA's actions in promulgating the final rule were reasonable, within the bounds of the Agency's statutory authority, and not arbitrary and capricious. Pet. App. 2740. More specifically, the Court of Appeals concluded that the final rule was validly promulgated under EPA regulations directed at "reasonably attributable" visibility impairment, and did not constitute the regulation of "regional haze." *See id.* at 2730. Petitioners did not seek rehearing or suggest rehearing en banc.

REASONS THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED IS FACT-SPECIFIC

Petitioners' own "Question Presented" confirms that this case presents an intensely fact-specific issue not warranting further review by this Court. According to petitioners themselves, the issue is whether a specific agency rule governing emission requirements at a specific generating station complies with a specific set of regulations. After review of the voluminous record replete with scien-

tific data, the court below concluded that the Agency's "site-specific" process was "reasonable and within the bounds of its statutory authority, and not arbitrary and capricious," and that petitioners "simply adhere to a different interpretation of the rather disparate and equivocal scientific data in the record." Pet. App. 2739. There is no reason for this Court to exercise its discretionary jurisdiction on certiorari to undertake another review of the record.

Nor is there any reason to suppose that the decision below will have any broader impact on application of the Clean Air Act. Petitioners assert that the Ninth Circuit decision will leave application of the Clean Air Act in a "state of confusion." While long on melodrama, this argument ignores the reality of EPA's implementation of Section 169A. Congress enacted Section 169A sixteen years ago. The instant rulemaking marks EPA's first and only final rule establishing emissions controls for an existing source pursuant to Section 169A. Moreover, the prospects that the Agency will embark on future 169A rulemakings are dim. EPA has already considered applying its visibility regulations to the 156 national parks and wilderness areas at which the Agency, in consultation with the Secretary of the Interior, determined that visibility was an important value. *See* 40 C.F.R. §§ 81.400-81.437. In no case—aside from this action at the Grand Canyon—did EPA promulgate or even propose a regulation to control visibility impairment reasonably attributable to a specific source. Thus, the Agency's prior actions leave little, if any, room for the future regulation of visibility impairment pursuant to its 1980 Phase I regulations. *See* 54 Fed. Reg. at 36,950-51. Without such rulemakings, there is nothing to be left confused.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

CAWCD raises the specter of a conflict among the circuits, citing the Second Circuit's opinion in *Vermont v. Thomas*, 850 F.2d 99 (2d Cir. 1988), and the First

Circuit's opinion in *Maine v. Thomas*, 874 F.2d 883 (1st Cir. 1989). Petitioners mischaracterize the facts of both cases to create the conflict. Each is clearly distinguishable from the present case.

In *Vermont v. Thomas*, the state of Vermont sought in its SIP to remedy visibility impairment at the Lye Brook National Wilderness Area—a Class I area—by establishing a federally enforceable long-term strategy to reduce sulfate emissions from out-of-state sources. 850 F.2d at 101. Vermont found that the sulfates originated from a "multitude" of power plants and other industries utilizing coal and oil as fuel for boilers over an eight-state area. *Ibid.* Unlike the present case, Vermont did not find visibility impairment reasonably attributable to any specific source. In fact, no source was found responsible for any particular percentage of the visibility impairment. The Second Circuit rejected Vermont's express attempt to address regional haze impacts, finding that EPA's regulations only permitted the Agency to regulate visibility impairment that is reasonably attributable to particular sources. *See id.* at 103. The court below expressly addressed and distinguished *Vermont* on this basis. Pet. App. 2730-31.

Maine v. Thomas is even further removed from the facts of this case. In that case, Maine and several environmental groups alleged that EPA's failure to promulgate regional haze regulations constituted a derogation of a nondiscretionary duty to combat visibility impairment under 42 U.S.C. § 7491. *Maine*, 874 F.2d at 886. The First Circuit rejected this contention, finding the promulgation of the Phase I regulations constituted a final action and was thus reviewable only by the D.C. Circuit pursuant to 42 U.S.C. § 7607(b). The First Circuit thus upheld the District Court's dismissal of the case on jurisdictional grounds. *Ibid.*

The rulemaking now before the Court raises none of the same issues. Studies conducted by the NPS, SRP, and

others have attributed visibility impairment at the Grand Canyon to NGS. The studies were placed in the administrative record of this rulemaking. EPA relied on these studies in making a scientific judgment that visibility impairment was reasonably attributable to NGS—a crucial fact not present in either *Maine* or *Vermont*. Neither of those cases represented facts in which a state, or EPA standing in the shoes of the state, attributed visibility impairment to a single source. Thus, neither case is relevant to the issue currently before the Court.

III. THE DECISION BELOW WAS CORRECTLY DECIDED

Under the Clean Air Act, a reviewing court may reverse EPA regulations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This Court has recognized that a court reviewing agency action under an arbitrary and capricious standard of review "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). In view of EPA's responsibility for administering the Clean Air Act, this Court has held that reviewing courts must give great deference to the Agency's interpretation of the statute. *Environmental Protection Agency v. National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980). Moreover, when an agency's interpretation of its own regulations is at issue, "deference is even more clearly in order." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). This Court has found that an agency's construction of its own regulation deserves "substantial deference" so long as it is not "plainly erroneous or inconsistent with the regulation." *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 159 (1987) (citation omitted); *Arkansas v. Oklahoma,* 112 S. Ct. 1046, 1059 (1992). Here, Congress has directed EPA to administer Section 169A of the Clean Air Act. The visibility FIP for Arizona represents EPA's interpre-

tation of its visibility regulations promulgated pursuant to Section 169A and the federal action requirement of Section 110(c). Accordingly, this EPA action is entitled to the highest degree of deference.

Judicial deference is particularly appropriate due to the scientific details of the rulemaking. This Court has recognized that "a reviewing court must generally be at its *most* deferential" when an agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (emphasis supplied). The D.C. Circuit has similarly noted that courts are "extremely deferential to administrative agencies in cases involving technical rulemaking decisions." *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992). This rule recognizes that agency personnel have particular expertise in understanding and applying technical information and making scientific determinations. Substitution of a court's interpretation of scientific evidence for that of the agency is highly inappropriate.

Petitioners mount three challenges to EPA's rulemaking. First, they contend that EPA relied on the wrong methods in attributing visibility impairment to NGS. According to petitioners, EPA can only attribute visibility impairment to a source when it does so using simple methods, such as visual observation or simple monitoring,[6] and the use of more sophisticated attribution is

[6] Petitioners characterize "simple monitoring" as optical devices that enhance the human eye, such as nephelometers, telephotometers, and transmissometers, as well as photography. Even if petitioners were correct—and they are not—the result in this case would be the same. The rulemaking docket contained a photographic analysis of visibility impairment attributable to NGS, including a time-lapse video. SER 2 at 11-4, 6-25 to 6-27, and Video Attachment; ER 14 at 1-11, 8-4, 8-25, 8-44. Data supplied by transmissometers and nephelometers were also before the Agency. SER 2 at 6-18; ER 14 at 1-11.

impermissible. This head-in-the-sand theory leads to an absurd result. The use of more sophisticated analyses to achieve greater certainty that visibility impairment is attributable to a specific source and to provide a more precise measurement of that visibility impairment would be prohibited under the CAWCD formulation. CAWCD has it precisely backwards. The correct focus of EPA's implementing regulations is not on the relative sophistication of the attribution techniques employed but on the level of certainty that the techniques give to EPA's ability to attribute episodes of visibility impairment to individual sources.

EPA's visibility regulations define "reasonably attributable" as "attributable by visual observation or any other technique the State deems appropriate." 40 C.F.R. § 51.301(s). The definition contains no explicit or implicit limitation on the types of attribution techniques that the state—or EPA when standing in the shoes of the state —may employ to determine whether visibility impairment is reasonably attributable to a source. Nowhere does the regulation suggest that the monitoring techniques must be simple.

In fact, the regulations specifically require states to include a strategy for evaluating visibility impairment using appropriate monitoring techniques in its visibility SIP. 40 C.F.R. § 51.305(a). "Such strategy must take into account current and anticipated visibility monitoring research, the availability of appropriate monitoring techniques, and such guidance as is provided by the Agency." *Ibid.*

The regulatory history of the 1980 visibility regulations indicates that the use of sophisticated models and monitoring techniques are permissible at the discretion of the implementing state. In the preamble to the visibility regulations, EPA noted that "[i]nformation derived from modeling and monitoring can, in some cases, aid the

States in the development and implementation of the visibility program. In the first phase, the states are required to consider available modeling and monitoring information. The use of such information will be at the discretion of the State, and the States are not required to establish monitoring networks or perform modeling analyses." 45 Fed. Reg. at 80,085-86. Thus, the regulations do not prohibit the use of mathematical models and monitoring techniques, they merely do not "*routinely require* their use in a regulatory program for sources, either new or existing, that may impair visibility." *Id.* at 80,085 (emphasis supplied). By clear implication, the regulations permit the use of sophisticated attribution techniques when a state—or EPA standing in the shoes of the state—deems it appropriate.

Restricting states to visual observation and simple monitoring techniques would deprive states—and EPA, where necessary—of valuable information in their efforts to make accurate attribution determinations. Entities implementing the visibility regulations must be permitted to rely on sound science rather than be forced to close their eyes to it.

Second, petitioners take issue with EPA's ultimate conclusion that visibility impairment is attributable to NGS. EPA's scientific determination that visibility impairment in the Grand Canyon is reasonably attributable to NGS is, however, a factual finding entitled to substantial judicial deference. This is particularly so where EPA evaluated the methodologies and conclusions of no fewer than five major studies examining the impact of NGS emissions on the Grand Canyon. The Ninth Circuit concluded that "the technical, scientific record more than adequately supports EPA's reasonable conclusion that visibility impairment in the Grand Canyon is 'reasonably attributable' to NGS." Pet. App. 2732. That court properly deferred to EPA's "reasonable interpretation of its own regulations

and statutory mandate." *Ibid.* There is no reason for further review by this Court.

Finally, there is no merit to petitioners' suggestion that EPA proceeded wrongly in light of Arizona's default. EPA's Part 51 visibility regulations refer to the duties of "states" in the SIP planning process. The regulations' principal purpose is to set forth the requirements that SIPs—and therefore states—must meet to comply with the visibility regulations. The references to "states" is understandable in this context. However, when a state defaults on its responsibility to submit a visibility SIP—as Arizona has here—Section 110(c)(1) of the Clean Air Act, 42 U.S.C. § 7410(c)(1), requires EPA to promulgate a visibility FIP that fulfills the requirements of the Part 51 visibility regulations. Thus, Section 110(c)(1) requires EPA to stand in the shoes of the defaulting state and exercise all of the rights and duties under the regulations that would otherwise fall to the state. EPA has, on several occasions, fully explained its regulatory authority to act in the place of the "state" under Section 110(c)(1) when the state fails to submit an adequate visibility SIP. *See, e.g.*, 56 Fed. Reg. at 50,173 & n.2; 54 Fed. Reg. at 36,952. This interpretation of EPA's regulatory authority is eminently reasonable and thus entitled to deference. *See Mullins*, 484 U.S. at 159; *Udall*, 380 U.S. at 16.[7]

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[7] Petitioners contend that EPA's authority to conduct monitoring to attribute visibility impairment after it disapproves a SIP rests under 40 C.F.R. § 52.26 rather than 40 C.F.R. §§ 51.300-51.307. However, even if this were true, section 52.26(c) provides sufficient flexibility to allow EPA to use any monitoring technique the Agency deems appropriate to determine whether visibility impairment is attributable to a source. The regulation instructs the Agency to "use the following *as appropriate* to monitor visibility within each such area: (i) photographic cameras, (ii) fine particulate matter samplers, (iii) teleradiometers, (iv) nephelometers, (v) human observation, or (vi) *other appropriate technology*." 40 C.F.R. § 52.26(c)(3) (emphases supplied). This language provides EPA with con-

CONCLUSION

For the foregoing reasons, and those in the opinion below, the petition should be denied.

Respectfully submitted,

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siderable discretion to determine appropriate monitoring techniques. Moreover, the preamble language in the Federal Register notice announcing the promulgation of Section 52.26 equates the monitoring required under this section with the monitoring required pursuant to 40 C.F.R. § 51.305. *See* 50 Fed. Reg. 28,544, 28,545 (July 12, 1985).